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No. 88-820

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IRON WORKERS REINFORCED RODMEN, LOCAL 201,
Petitioner,

v.

JESSIE BERGER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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Respondents' attempt to harmonize their position here with the Court's position in *Watson v. Fort Worth Bank and Trust*, 108 S. Ct. 2777 (1988), is wholly unavailing.

1. With respect to the causation issue discussed in our petition at 11-14, respondents proudly, and repeatedly, assert that in this case, unlike in *Watson*, the plaintiffs did "'identif[y] a specific employment practice'—the classroom training prerequisite for experienced applicants." Resp. Br. at 6. But as we explained in our petition, *Watson* requires more than the identification of an employment practice; while identification is where "plain-

tiff must begin," 108 S. Ct. at 2788, *Watson* also requires that "[o]nce the employment practice at issue has been identified, *causation must be proved*." *Id.* (emphasis added). It is at that second point that respondents' case —and the court of appeals' analysis—collapses.

Respondents offer only a single sentence in an attempt to reconcile the decision below with the causation requirement of *Watson*. According to respondents:

> The court of appeals . . . held that the discriminatory effect of th[e experience] requirement was proven by comparing the racial composition of experienced rodmen seeking to take the journeyman exam to the racial composition of experienced rodmen admitted to the union.

Resp. Br. at 71. That is simply not what the court below held. The court of appeals in fact compared the racial composition of experienced rodmen seeking to take the exam with the racial composition of *all* rodmen admitted to the union, regardless of their experience. *See* Pet. at 6.

Indeed, had the court of appeals conducted the analysis suggested by respondents, it would have found not underrepresentation of blacks but underrepresentation of *whites*: whereas the racial composition of experienced rodmen was 45.9% black and 54.1% white, Pet. App. 122a,[1] the racial composition of experienced rodmen admitted to the union was 100% black and 0% white. This was because the only experienced rodmen who be-

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[1] Because "the Union does not keep statistics regarding applicants to take the exam . . . a proxy for identifying potential applicants had to be devised" in this case. Pet. App. 24a. The proxy that was used was "non-member permit workers with at least two years' experience." *Id.* at 25a. Of the 270 individuals meeting that criterion, 124 were black (45.9%) and 146 were white (54.1%). Pet. App. 25a-26a, 122a. (Due to a mathematical error, in our petition we erroneously stated the percentage of experienced blacks to be 47.7%. Pet. at 6.)

came union members during the relevant period were black participants in the affirmative action Training Program created for older minority workers. Pet. at 7.

Thus, respondents are simply wrong in suggesting that the decision below can be reconciled with this Court's decision in *Watson* which, as we noted in our petition, issued after the court of appeals ruled in this case. Accordingly, a remand to the court of appeals for reconsideration of the decision with respect to causation is required.

2. Respondents are equally incorrect in claiming that the justification issue addressed in our petition at 14-16 and currently pending before the Court in *Wards Cove Packing Co. v. Atonio*, No. 87-1387, was not raised in the courts below.

In the district court, the Local expressly argued, in its post-trial brief, that "the vast weight of the evidence showed that this [the rodman trade] is an apprenticeable trade *in which formal classroom training is a necessary adjunct to on-the-job experience.*" [2] The Local based that argument on testimony it had adduced at trial to the effect that:

> [T]here is no way anyone can learn the trade, our trade just by on-the-job-site training, working day to day in a sense that he will become a full fledged journeyman, knowing the full aspect of the trade as applied to the field.
>
> * * * *
>
> There is some phases of the work out here that you can't learn all of these in 2,000 hours or 4,000 hours or 8,000 hours unless you had someone programming the situation where you could go from one job to the

[2] Reply of Defendants Local 201 Apprenticeship Committee and Training Program to Plaintiffs' Post-Trial Brief at 6.

> next job and the next and get a different one each time. This is not the reality of things out there.[3]

Similarly, in the court of appeals the Local argued that the rodmen trade is a "skilled trade," that the purpose of the training requirement was "to produce competent and effective journeyman rodmen," that "[t]here was considerable evidence, unrefuted in the record, of the nature of, and the need for, this training," and that there was a "clear showing in the record that work experience alone does not constitute sufficient training in the craft."[4]

Thus, respondents are mistaken in suggesting that the Local failed to place in issue the legitimacy of its reasons for requiring classroom training as a prerequisite to becoming a journeyman rodman. And because, as we showed in our petition, the decision below rejecting the Local's justification for that requirement is inconsistent with the plurality opinion in *Watson* and raises one of the very issues posed in *Wards Cove*, this aspect of the case should be held for *Wards Cove*.

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[3] *Id.* at 8, quoting Tr. 1514-16; *see also id.* at 10, Tr. 1838 ("classroom instruction [is] necessary to be a competent rodman"); *id.* at 11-12, Tr. at 3044-46 (rodman skills "have to be acquired . . . [in a] classroom of some kind").

[4] Brief of Appellants Local 201, Apprenticeship Committee and Training Program at 13, 99, 122, 125.

CONCLUSION

For the foregoing reasons, the Court should defer action on the instant petition pending decision in *Wards Cove* and thereafter the Court should grant the instant petition and either (i) remand the case for further reconsideration in light of *Wards Cove* and *Watson* or (ii) set the case for plenary argument to resolve any questions posed here but not resolved in *Wards Cove*.

Respectfully submitted,

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